APPEAL NO. 93423

is appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On April 29, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues presented at the CCH and agreed upon were: "whether a treating doctor can change his opinion as to maximum medical improvement (MMI) and did the Claimant have good cause for failing to dispute [MMI] and permanent impairment rating in a timely manner." The hearing officer determined that the treating doctor's attempt to change his certification of MMI was invalid and that there was no good cause for not disputing MMI in a timely manner.

Appellant, claimant herein, requests a review contending that no form certifying MMI "has ever been received by the claimant. . . ." Respondent, carrier herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The hearing was very brief and much of the case involves an interpretation of the workers' compensation law (1989 Act). The medical evidence in this case is fairly and accurately set out in the hearing officer's Statement of Evidence and we adopt it for purposes of this decision. The medical records indicate that claimant suffered a work-related injury to her low back when a stack of merchandise fell on her, knocking her to her buttocks on (date of injury). She was initially treated by (Dr. D), who is the treating doctor. A brief chronology of events is as follows:

4-20-92 Report from Dr. D, who states he saw claimant for re-evaluation. Dr. D stated he had exhausted diagnostic testing and that claimant would have an element of nerve injury "for another year."

4-28-92 Report of Dr. D. Claimant seeks clarification from Dr. D regarding the 4-20-92 office visit and is advised on employment restrictions. The hearing officer states, "[a]s result of the office visit of April 28, 1992, (Dr. D) completed a TWCC Form-69 Report of Medical Evaluation. . . ."

-The record contains an undated TWCC-69 from Dr. D certifying MMI on April 28, 1992 with a ten percent whole body impairment rating. The TWCC-69 does not reference a narrative nor detail how the impairment was computed.

-Sometime in latter May, first part of June or in July. Claimant speaks with carrier's

adjustor who tells claimant of Dr. D's MMI certification and ten percent impairment rating. Claimant's benefits are reduced from $240.72 a week to 224.57 a week.

11-3-92 Dr. D's report of November 3, 1992, to carrier that claimant "will experience some degree of pain on a permanent basis.

11-23-92 TWCC Compass A log notes "Clmt calls needing asst, she is not in agreement w/reaching MMI, 4/28/92, I advised it locks in after 90 days, if no one calls in to dispute case. . . . Clmt indicated she was not aware that she had 90 days to dispute the impairment rating."

1-27-93 Letter from Dr. D to claimant's attorney stating "I therefore withdraw my statement on maximum medical improvement and refer you to (Dr. A), who is now to be her treating physician, for his opinion regarding (MMI)."

1-28-93 TWCC Compass A log notes "BRC held 1-28-93. Whether clmt has reached MMI. Treat Dr has now rescinded his certification of MMI and referred clmt to another Dr. for continued treatment. Carrier will resume TIBS but requests Des Dr as they dispute that clmt is not MMI and why doctor changes his report. Set up des Dr. appt with neurologist, (Dr. H) for 2-11-93 at 3:00. Reset BRC after des Dr. appt. No CCH. Benefits cont. TLR."

2-11-93 Designated doctor, Dr. H, reports "I do not think that this patient has reached (MMI) at this time."

3-5-93 Benefit Review Conference (BRC) where the issues were whether a doctor can find MMI and later change his opinion and whether there is good cause for failing to dispute MMI and impairment in a timely manner.

The hearing officer found in pertinent part:

FINDINGS OF FACT

5. The Claimant's treating doctor documented on April 20, 1992, that the Claimant had a nerve injury which would be present for at least another year.

6.The Claimant's treating doctor certified maximum medical improvement on April 28, 1992, with a 10% whole person impairment rating.

7.On January 23, 1993, the Claimant's former treating doctor withdrew his certification of maximum medical improvement because her problem was neurological rather than orthopedic in nature.

8.The Claimant had knowledge that she had reached maximum medical improvement sometime in July, 1992, when her income benefits either changed or were stopped.

9.October 29, 1992, was the 90th day after July 31, 1992.

10.On November 23, 1992, the Claimant notified the Commission that she was not in agreement with having been certified as having reached maximum medical improvement on April 28, 1992.

CONCLUSIONS OF LAW

2.A doctor can change his opinion about whether a Claimant has reached maximum improvement, if his original opinion were incomplete or based on erroneous facts and done fairly soon after his first report. Decision on Appeal, Appeal No. 92639 Docket No. (TY-91-062309-01-CC-TY41) decided on January 14, 1993.

3.On April 20, 1992, the Claimant's then treating doctor identified and documented the Claimant's nerve injury before he withdrew his certification because her problem was neurological; therefore, his original opinion about maximum medical improvement was neither incomplete nor erroneous. Decision on Appeal, Appeal No. 92639 Docket No. (TY-91-062309-01-CC-TY41) decided on January 13, (sic) 1993.

4.The Claimant's then treating doctor certified maximum medical improvement on April 28, 1992, which was 9 months before he rescinded his certification of maximum medical improvement; therefore, the treating doctor's recision of his certification of maximum medical improvement was not fairly soon after his first report. Decision on Appeal, Appeal Nol 92639, Docket No. (TY-91-062309-01-CC-TY41) decided on January 13, (sic) 1993.

5.The Claimant's November 23, 1992 dispute of her April 28, 1992 date of maximum

medical improvement was untimely because it was made more than 90 days after the Claimant had knowledge of her then treating doctor's certification of maximum medical improvement; therefore, the first impairment rating of 10% is final. Tex. Workers' Comp. Comm'n., 28 Tex. Admin Code § 130.5(e) (Rule 130.5(e)).

7.The Claimant reached the point after which she would have no further material recover or lasting improvement to her compensable injury on April 28, 1992. Tex.Rev.Civ.Stat.Ann., arts. 8308-1.03(16).

8.The Claimant's percentage of permanent impairment to her whole body resulting from her (date of injury), compensable injury is 10%. Tex.Rev.Civ.Stat.Ann., arts 8308-1.03(25).

9.There is no good cause exception to untimely disputing maximum medical improvement or impairment ratings. Tex. Workers' Comp. Comm'n, 28 Tex. Admin. Code § 130.5(e) (Rule 130.5(e)).

Claimant disputes Finding of Fact No. 8, cited above, on the ground that "Rule 130.2 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.2) provides that the treating doctor must complete a report required by Section 130.1 and shall be on a form prescribed by the Commission. . . ." We have held that the Report of Medical Evaluation, TWCC-69 form is the form prescribed by the Commission in Rule 130.1. Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, and Texas Workers' Compensation Commission Appeal No. 91084, decided January 3, 1992. Rule 130.5(e) provides "The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." We have observed that, notwithstanding the language in Rule 130.5(e), the 90 day time period in which to dispute the first impairment rating assigned to an employee does not necessarily run from the date the rating is actually assigned by the doctor. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, and Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. The rationale, as explained in Appeal 92542, *supra*, is "that it would require some stretch of the imagination to find that claimant could dispute a doctor's report before he was aware that it was rendered." Consequently it is when the claimant has actual knowledge of the MMI certification or impairment rating that becomes the more critical matter, rather than when the rating is assigned. In the case at hand, the hearing officer specifically asked claimant "when was the first you had found out that you may have reached MMI in April of '92." The response was "When I called Karen Wells, my adjustor (actually carrier's adjustor) in latter part of May--first of June because--benefit check and she is the one who told me that (Dr. D) had given MMI with 10% disability (sic) (means impairment rating)." The hearing officer asked if she meant impairment and claimant replied "Yeah, I guess so." It is clear from this exchange

that claimant had actual knowledge of MMI and the 10% impairment either in latter May, early June, or in July if this was the conversation claimant referred to on direct examination when she stated she spoke with the adjustor in July. Because of the imprecise date, the hearing officer found claimant had knowledge that she had reached MMI sometime in July 1992, when her income benefits either changed or were stopped. The hearing officer, giving claimant benefit of the doubt, apparently found the conversation with the adjustor could have taken place as late as July 31st in that he computed the 90 days to dispute MMI and impairment, in accordance with Rule 130.5(e), from that date. Claimant's statement in her appeal, that she ". . .still maintains that there has been no knowledge of Maximum Medical Improvement given to her other than a statement by a nurse at the doctor's office" is not borne out by the sworn testimony that claimant gave at the CCH. In fact, the allegation a nurse in the doctor's office told her about MMI would create an inference that claimant was told of the MMI certification and impairment by the doctor's nurse in April 1992. We find no error by the hearing officer and find claimant's appeal, on this point to be without merit.

Further contact by claimant is recorded in the TWCC Compass A log on November 23, 1992, when she "called back" as "Clmt indicated she was not aware that she had 90 days to dispute the impairment rating." Rule 130.5(e) contains no conditions, such as good cause. But even if there were a good cause provision, ignorance of the law does not constitute good cause. *See* Petroleum Casualty Co. V. Canales, 449 S.W.2d 734 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.) and Applegate v. Home Indemnity Co., 705 S.W.2d 157 (Tex. App.-Texarkana 1985, writ dismissed).

Claimant also contends that the appointment of a designated doctor pursuant to Article 8308-4.25(b) to determine MMI resulted in Dr. H being appointed and that the designated doctor's report "shall have presumptive weight, and the commission shall base its determination. . .on that report. . . ." However, even as claimant implicitedly recognizes, the designated doctor's procedure only becomes relevant after the claimant has disputed MMI. As claimant had not timely disputed the MMI certification and impairment rating, the subsequent appointment of a designated doctor, at carrier's request, does not cure claimant's failure to timely dispute the MMI certification.

In that the conclusion that claimant had not timely disputed MMI and impairment is dispositive of this case, it is not necessary to address the issue of whether a treating doctor can change his opinion as to MMI, and if Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993, would indicate so, whether the conditions of Appeal No. 92639, *supra*, are applicable.

The 1989 Act provides that the hearing officer, as the fact finder, is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Article 8308-6.34(e). Upon a review of the record, we find that the challenged findings and

conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge